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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. DERRICK STARKS, Defendant and Appellant.	B227728 (Los Angeles County Super. Ct. No. BA 336289)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bob S. Bowers, Jr., Judge. Affirmed.

John A. Colucci, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Joseph P. Lee, Michael R. Johnsen and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Derrick Starks timely appealed from his convictions for first degree murder and possession of a firearm by a felon.[1] The jury found true the gang special circumstance murder, gang and gun allegations. The court found true the allegation Starks had suffered a prior serious or violent felony and served a prison term for that offense. The court sentenced Starks to life without the possibility of parole, plus a consecutive terms of 25 years to life for the firearm enhancement, and a consecutive term of nine years for the firearm possession offense. Defendant raises several issues, including claims he was denied the right to confront and cross-examine by the court's admission of a co-defendant's out-of-court statements and by allowing another witness's former testimony to be read even though the prosecution allegedly had not exercised due diligence to produce the witness. We affirm.

FACTUAL BACKGROUND

I. Prosecution Case

On May 11, 2007, Matthew Warren, aged 17, was in the area of 80th Street and St. Andrews, where his grandfather lived. Around 4 p.m., Warren was sitting in the front passenger seat of a Ford Explorer. Warren saw a black Suburban pass by a couple of times, which made him nervous. The Suburban stopped behind a dumpster, two to four feet from the Explorer, with its back end closer to the back of the Explorer. There were four people inside the Suburban. Warren saw an African American male (whom he later identified as co-defendant Davis) get out of the driver's side rear door of the Suburban. Davis was wearing gloves; he ran and grabbed for something in his pants. Davis then extended his arm straight out from his body holding a .38 caliber revolver, pointed and fired three times. Davis said something like "L.A. Crip" and then returned to the Suburban.

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[1] Appellant was tried with co-defendant Devin Davis before separate juries.

Warren saw 18-year-old Bryant Tennelle get shot as Tennelle was walking across the street. Tennelle fell to the ground.

Warren was afraid because the shooter's gun was a .38 caliber with six shots and only three shots had been fired. Warren made eye contact with the shooter when the shooter returned to the Suburban and saw the shooter's eyes were reddish and "real low," suggesting the shooter was high or nervous.

Warren identified Davis as the shooter in a photo six-pack as "'an almost positive match.'" Warren did not notice appellant or the others in the Suburban because he was focused on Davis.

Arielle Walker, Tennelle's girlfriend, had been with Tennelle shortly before the shooting; when she heard shots, she ran to the corner of St. Andrews and saw Tennelle on the ground. Tennelle always wore a hat, and when Walker saw the hat on the ground, she realized Tennelle had been shot in the head.

Walter Lee Bridges was walking down the street with Tennelle when Tennelle was shot. Bridges heard someone say, "Hey." Bridges turned and walked backwards because he saw the guy had a gun. The gunman approached quickly and fired; Bridges ran, heard four or five shots and saw a flash. Bridges described the shooter as African American, but he did not see the shooter's face clearly enough to identify the shooter.

Tennelle habitually wore a Houston Astros baseball cap. The cap was one of the logos of the Eight Trey Hoover Criminal Gangsters (Eight Trey Hoover). The shooting occurred in the heart of territory claimed by the Eight Trey Gangster Crips (Eight Trey Crips). The Eight Trey Hoover gang was a sub-group of the Eight Trey Crips; the two gangs had a friendly relationship. Appellant and Davis were members of the Blocc Crips gang. The Blocc Crips gang was a rival of the Eight Trey Crips and the Eight Trey Hoover gangs.

Joshua Henry, who had known Tennelle for five years, testified Tennelle was not a gang member and knew nothing about what colors and clothing not to wear. Tennelle wore a hat; Henry told Tennelle the hat was not appropriate to wear in certain areas

because of gang connotations. Henry was in the area when Tennelle was shot and heard four shots. Henry saw Tennelle on the ground and thought Tennelle had been shot in the back of the head.

Calvin Abbott also heard gunshots that night; he heard three to five shots. Abbott dropped to the ground and then got up and peeked over a gate and saw a young man leaning against a tree; the gate was about 230 feet from an SUV. After the shots were fired, the man ran toward a black SUV and got in on the passenger side. Abbott noticed the man had a gun in his hand, but Abbott did not see the man fire the gun. In a photo lineup, Abbott identified Davis as the suspect who ran to the black vehicle, but he was not 100 percent sure of the identification.

Four days after the shooting, California Highway Patrol Officer Justin Banthouse responded to a traffic accident at 11th and Harvard Avenue involving several vehicles. Banthouse went into an alleyway where he saw a black Suburban with collision damage; he saw appellant getting out of the driver's side of the car. Appellant, who had an outstanding warrant for his arrest, admitted driving the car. Appellant's mother said her son was living with her in April 2007 and drove his father's black Suburban.

Jessica Midkiff, appellant's girlfriend, testified she was present when the Suburban crashed. Midkiff started dating appellant in May 2007. Appellant was very controlling, and he let her know that if she did not do what he asked, there would be consequences.

On May 10, 2007, Midkiff spent the night with appellant at the Desert Inn, a motel at Western and Imperial. Appellant told her to drive to a location where two African American males got into the car; one was Davis. While in the vehicle, appellant had a conversation with someone using the "chirp" function of his cell phone. Appellant sat in the front passenger seat; Midkiff believed Davis sat behind her in the back; the other person sat in the back.

As Midkiff drove, Davis tried to give her directions, but appellant told her not to listen. At appellant's direction, Midkiff headed toward downtown. Midkiff drove from

Blocc Crips territory to rival gang territory. Appellant played a compact disc of "Crip" music. At Davis's request, one song was played three or four times; Davis said it was his favorite song. Davis was acting really hyper and taunted the other rear seat passenger, "You never do any work." Appellant told Midkiff to make a U-turn; she did so and parked by a wall. The men in the back seat wore "working gloves." Midkiff saw the butt of a black revolver, which Davis put into the front part of his pants, either in the waistband or pocket. Davis and the other rear passenger got out of the car, went behind the car and disappeared around the corner. Midkiff asked appellant what he had gotten her into, and he told her to be quiet. Davis and the other man were gone for about a minute; Midkiff heard three or four shots ring out, was startled and jumped. Appellant, who did not react to the shots, pulled her across him and got into the driver's seat.

Davis and the other man returned to the car, and appellant drove off and then dropped the two men off. Before he was dropped off, Davis said he thought he "got" someone, but he did not know for sure; he was still hyper and said he was "the man" and appeared to be proud. Appellant told Davis to be quiet and "[y]ou did good." When Davis was in the Suburban, he was jumpy and weird and said he did not know if he had hit anyone.

Between May and December 2007, Midkiff did not contact the police out of fear. After she was arrested, Midkiff identified appellant and Davis in photo six packs.

Tennelle died of a gunshot wound to the head. Ballistics tests revealed the bullet fragment removed from Tennelle's head during the autopsy and the bullet recovered from the crime scene had been dispelled from a weapon later found in the possession of Leonard Langley.

Langley was found to be unavailable and his preliminary hearing testimony was read into evidence. On July 11, 2007, Langley was arrested for possession of a handgun. Langley, who was confined to a wheelchair, did not want to speak with law enforcement because he was afraid for his safety if he was labeled a snitch. In a recorded interview, Langley told police that the gun he had been arrested with "had a murder on it." Langley

denied he had gotten the gun from appellant, at first telling the detectives he got it from a "smoker."

In a later interview, Langley said he had gotten the gun from "No Brains," a member of the Blocc gang. Even though Langley introduced the name "No Brains, " he claimed he said he got the gun from appellant because the police pressured him. In a photo lineup, Langley identified appellant as No Brains. Langley told one of the prosecutors in this case that he had obtained the gun from appellant. When Langley bought the gun from appellant for $50, he did not know it was hot. Langley once belonged to the Nickerson Gardens gang, but he had been paralyzed in a shooting and no longer gang banged. Langley was concerned for his safety and the safety of his family.

Detective John Skaggs put a recording device in a cell with appellant and Davis and recorded their conversations, which took place over 13 hours. Portions of the conversations were played at trial. In the first passage, Davis asked appellant, "The bitch telling on me?" In the second passage, appellant stated, "Bitch-ass be squealing man, I'll kill her." Davis stated detectives had told him that "your bitch gonna come to court on me." Appellant replied, "I don't know. That bitch better get killed." In the third passage, the men discussed the existence of physical evidence. Appellant stated, "Possibility they charging us because of Jessica. I bet she's the one who telling." Davis referred to appellant as "Brain."

In the fourth passage, Davis stated, "That bitch, that bitch stupid. That's, that's my bitch. That bitch stupid . . . if she find out what you did to her, she gonna get it." Appellant replied, "I hope so." The men then discussed having Midkiff killed. Appellant said, "There wouldn't have been a case if you wouldn't have said nothing." Davis replied, "I know cuz." In the fifth passage, appellant said he had confirmed with his attorney that Midkiff was snitching and that the prosecution might use Davis against him. Davis ensured appellant that he would never do that to him. Appellant advised Davis not to talk about the case to anyone, even in county jail, because conversations could be recorded. Appellant and Davis referred to "Johnny Cochran" and "O.J. Simpson style"

when discussing their defense strategy. In the sixth passage, appellant referred to Langley and predicted Langley would not testify against him. Appellant agreed with Davis that Langley should have simply said nothing instead of telling detectives, "'I bought it from No Brains.'"

In the seventh passage, Davis stated that Midkiff told the detectives that they had been listening to Crip music before the shooting, and "That bitch told on me." Appellant replied, "Wait till I see her. When I get out." In the eighth passage, Davis stated Midkiff should either have said nothing or lied to the detectives. In response, appellant pointed out that Davis should not have said anything. In the ninth passage, Davis said, "You got to get to that bitch, homie. You got to get to her. That's our way out, cuz. I'm not gonna lie to you, cuz. I'm scared as a motherfucker." Appellant replied, "Yeah, I got 'Rocky' on it." Rocky was a Blocc Crips member connected to appellant before the shooting.

In the tenth passage, Davis stated, "I'm going to tell them I'm retarded, cuz. I'm telling you that shit will work. I don't understand. I can't read." In reference to Midkiff, appellant stated, "I get to her house and get to her kid." Midkiff had an eight-year-old daughter. In the eleventh passage, Davis stated, "They already know where I'm from" based on his tattoos. Appellant stated he was not "into killing" anymore. Appellant then stated if he did kill anyone, it would be "a cooper" and he would target Detective Skaggs. In the twelfth passage, appellant tried to reassure Davis by stating, "The hardest thing to prove, homie, is a murder," because the victim could not "come back from the dead and be like, 'Oh, yeah, he killed me.'"

Officer Daniel Leon testified as the prosecution's gang expert and opined the shooting was to benefit the Blocc Crips gang and the individual gang members by furthering the criminal activities of the gang, making citizens reluctant to cooperate with police for fear of gang retaliation and helping the gang maintain its territory. Detective Roger Guzman testified the crime scene was located in the heart of the territory claimed by the Eight Trey Crips. Leon and Guzman opined that if two gang members drove a car deep into rival gang territory, they would not expect a mere fistfight to occur as the gang

members would not only have to successfully enter rival territory, they would also have to leave it successfully. Gangs often used female drivers to complete "missions" so that the car carrying gang members did not draw attention from rivals. Older members utilized younger members to complete missions.

II. Defense Case

Appellant admitted he was a Blocc Crips gang member, but testified he was out of state in Louisiana and North Carolina when the shooting took place. Appellant first heard about the shooting while he was in lock up. Appellant left Los Angeles for the east coast on about May 4 or 5, 2007, and returned to Los Angeles on May 14 or 15.

Appellant and Midkiff frequented the Desert Inn Motel. Appellant confirmed that the registration form from the motel dated May 10, 2007, had his license number, address, date of birth and signature.

Appellant had spoken to Langley once or twice, but denied selling Langley the gun. Appellant told Detective Skaggs that he might have touched the gun as it was a "hood gun," i.e., collectively owned by a gang.

Appellant had prior felony convictions for driving without owner's consent, robbery and attempted burglary.

III. Rebuttal

The general manager of the Desert Inn testified the motel keeps registration records in the regular course of business and there was a registration card with the number of Starks's drivers license, showing a check in date of May 10, 2007.

Detective Sean Hansen, an expert on cell phone use, testified the cell phone records for Starks's two cell phones indicated that on May 11, 2007, there were 23 calls in Los Angeles around the general area where the killing occurred. On May 11, there was a call using the walkie-talkie or "chirp" function of the phone at 5:48 p.m. There was no cell phone activity for either of Starks's cell phones outside of California from May 6 through June 21, 2007.

Detective Skaggs testified that before Starks's trial testimony, he had no information from any source indicating Starks was in Louisiana or North Carolina at the time of the murder.

DISCUSSION

I. Co-defendant's statements

Appellant contends his Sixth Amendment right to confront and cross-examine witnesses was violated when the court allowed admission of a co-defendant's (Davis) out-of-court statements in violation of *People v. Aranda* (1965) 63 Cal.2d 518, *Bruton v. United States* (1968) 391 U.S. 123 and *Crawford v. Washington* (2004) 541 U.S. 36.

A. Background

Outside the presence of the jury, the prosecutor informed the court that he believed appellant would be testifying and that he intended to cross-examine appellant about his in-custody statements to Davis that referenced Davis's statements to Detective Skaggs relating to appellant having told Davis to keep his mouth shut and appellant's desire to sever his case from that of Davis. The prosecutor stated he was not going to read from Davis's transcript, "but it's going to come out Mr. Davis made a statement, and [appellant] learned about it when reading from the report from Detective Skaggs[']s] interview of [Davis]." The prosecutor mentioned that appellant's counsel had suggested he talk to the court about his intention and that the reason they had dual juries was to avoid the *Aranda-Bruton* issue.

The court responded: "I don't know if it's too sophisticated or whatever it is. We don't need to know what Davis allegedly [said], but we need to know that he being Starks believed it was negative to him. I don't know how you finesse that, but the point is, the bottom line is you believe he [Davis] said something negative or whatever, whatever words you [the prosecutor] wanted to use. I don't need specific words. Other than that, I'm fine." Defense counsel made no comment on the court's ruling and lodged no objection.

Appellant challenges the following questions the prosecutor asked during cross-examination:

- Q On February 26, 2008, were you and defendant Davis placed in a cell together?

  A Right.

  Q Prior to that, were you aware that he was implicating you in this crime? Prior to being put into the cell with him, were you aware he was implicating you, of having been in your black vehicle on May 11th with Jessica and him at the crime scene?

  A Yes.

  Q. During the 26th of February, 2008, on numerous occasions did you tell [Davis], "You should have kept your mouth shut"?

  A Yes.

- Q Did you tell Mr. Davis . . . [t]hat there wouldn't have been a case if you hadn't said nothing?

  A Right. I was referring to him, not me, there wouldn't have been a case for him.

  Q Did you come, after making that statement, up with a plan which is we are going to get our case separated because see, I can't cross-examine you, my lawyer can't, so the cases are going to be separated? And as long as you don't testify, it will be cool. Did you and he have that conversation where you were telling him what the plan was, including having the case separated because of the inability to cross-examine him as a witness against you?

  A I wanted to separate the cases, yes.

  Q Because of the reason that I just stated?

  A More than just that. Yes, more than just that reason.

- Q Would it be accurate to state that the only reason that you wanted separate trials from Mr. Davis is because he had given a statement to the police on tape that indicated that you were in the vehicle when he shot the gun at the boy at 80th and St. Andrews?

  . . . .

  [A] No, it wouldn't be.

  . . . .

  Q Was there any other possible reason as to why you wanted separate trials?

  A I can't remember right now.

Appellant also challenges the following statements of the prosecutor made during closing argument after the playing of portions of the tape recorded conversation between appellant and Davis:

- This is a passage somewhat after the passage I just showed you. It was at 9:35 in the morning where they are again on the same topic, starts saying, the defendant here in court is saying "He said," whether he is talking about his lawyer or who, I don't know, "He said the only thing that as strong as the case is, is you and old girl." Old girl being Jessica, as you see from the follow-up dialogue we have here.

  "You," he is saying, talking to Davis, "Is you," as we know from later conversations and from what he testified to. You is, the fact that you're talking, the fact that you made a statement, the fact that you implicated me in this crime. Starks was told the two strikes in the case are Davis' statements against Starks and old girl, and Jessica who is snitching.

- Mr. Starks' goal, the plan is, what we are playing here are small parts of what you all have. His plan is, as he testified, was to have the two separated. "They get the bitch's statement kicked out." That's Jessica. And they will have someone say "I was, I was with them the whole time."

  The way it's said and the whole context in which they are talking about here is not that -- I was really with someone else. And I'm going to have the real witnesses tell the people where I really was. It was "I'm going to separate my case from yours because of your statement against me. And my inability to cross-examine you will require a severance or dual jury, for that matter. And then I will get Jessica's statement kicked out and then have somebody say I was with them the whole time."

- The jail calls. [Starks] himself admitted most of them right there on the stand. Yep, we were talking. Yep, that's what was said. A couple he denied, but the big ones, separating the case. Again [defense counsel] asked him twice. [The prosecutor] asked him can you think of any other reason that you want to separate this case from your co-defendant, the shooter, Davis, other than the fact that he implicated you in this, implicated you in this very shooting in a taped interview, in this very shooting in a taped interview. Defendant Davis implicated that man. Can you think of any other reason you would want to separate this case? Nope, I can't think of any right now. [¶] You have got to be kidding me, folks.

B. Harmless Error

Appellant's trial was separated from that of Davis because of an *Aranda-Bruton* problem. Noting the ostensible reason for the questioning was to explain appellant's statements to Davis, appellant asserts the problem was that the prosecutor's questions and his answers told the jury, by implication, that Davis had inculpated appellant, which violated his Sixth Amendment right as he was never given the opportunity to confront and cross-examine Davis on the subject.

"The principle is well established: '[A] nontestifying codefendant's extrajudicial self-incriminating statement that inculpates the other defendant is generally unreliable and hence inadmissible as violative of that defendant's right of confrontation and cross-examination, even if a limiting instruction is given.'" (Italics deleted.) (*People v. Hill* (1992) 3 Cal.4th 959, 994, disapproved on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) The holding that admission of a nontestifying defendant's extrajudicial statement implicating a codefendant violates the codefendant's rights under the confrontation clause, "extends only to [extrajudicial statements] that are not only 'powerfully incriminating' but also 'facially incriminating' of the nondeclarant defendant." (*People v Fletcher* (1996) 13 Cal.4th 451, 455 & fn. 1.)

Respondent argues that appellant forfeited his confrontation challenge by failing to object to the court's ruling permitting the prosecutor to question appellant about the effect on him of Davis's statements to the detectives, by not objecting to the challenged cross-examination questions, and by failing to object/request an admonition to disregard the prosecutor's challenged comments in closing. Appellant suggests that it was not necessary to object to the ruling after an in limine hearing and that it would have been futile to object in view of the court's ruling. (See *People v. Arias* (1996) 13 Cal.4th 92, 159.)

The court ruled that the prosecutor could ask appellant if Davis had said anything negative about him. A negative comment could be based on any number of reasons.

Such a question could be proper as going to appellant's state of mind and to explain why he told Davis to keep quiet. (See *People v. Carter* (2003) 30 Cal.4th 1166, 1205-1209.)

Appellant argues the prosecutor's questions and argument were misconduct as they violated the court's ruling. We agree the prosecutor went beyond the permitted question when he asked appellant if Davis had implicated appellant of being in the car with Jessica and Davis at the crime scene, but we conclude that the prosecutor's questions/comments did not constitute the type of outrageous conduct censored in *People v. Pigage* (2003) 112 Cal.App.4th 1359, 1374. In *Pigage*, a case cited by appellant, the prosecutor bickered with the court, threatened to disobey the court's order not to comment on the defendant's absence from trial, and then commented on the defendant's absence. (*Id*., at pp. 1370-1374.) The appellate court concluded that the prosecutor committed misconduct in that "the threat to defy the court's order was unprofessional and improper, and his decision to act on this threat was outrageous," but it determined there was no basis to reverse the judgment as most of the misconduct occurred outside the jury's presence, the jury heard only a single reference to the defendant's absence immediately followed by an admonition from the court not to consider that fact during deliberations. (*Id*. at p. 1375.)

In view of the court's ruling, we believe the court would have sustained an objection to and/or admonished the jury to disregard the challenged questions/comments. Given the general nature of the court's ruling, it was incumbent upon defense counsel to make specific and timely objections. (See *People v. Mitcham* (1992) 1 Cal.4th 1027, 1044.) However, appellant claims that if his counsel should have objected, then he received ineffective assistance. Accordingly, we will address the merits of appellant's confrontation challenge. (*People v. Scaffidi* (1992) 11 Cal.App.4th 145, 151.) Assuming arguendo the questions/comments violated *Aranda-Bruton* and *Crawford*, the question is whether the error was harmless.

"Under the *Chapman* test, *Aranda–Bruton* error is harmless where the properly admitted evidence against defendant is overwhelming and the improperly admitted

evidence is merely cumulative. To find the error harmless we must find beyond a reasonable doubt that it did not contribute to the verdict, that it was unimportant in relation to everything else the jury considered on the issue in question. We employ the same analysis for *Crawford* error since the *Chapman* test also applies." (Citations omitted.) (*People v. Song* (2004) 124 Cal.App.4th 973, 984-985; accord *People v. Burney* (2009) 47 Cal.4th 203, 232.)

We conclude the claim lacks merit as Davis's statements appellant was in the car at the crime scene were not powerfully incriminating nor even facially incriminating; in fact, they were merely cumulative of Midkiff's testimony, which was even more damaging as she testified that not only was appellant in the Suburban, but also that he was controlling and ordered her to follow only his directions. Appellant ordered Midkiff to pick up Davis and drive deep into rival gang territory, directed her where to park, told her to be quiet when she asked what he had gotten her into, was not startled by the shots, and then took over the driving. The evidence against appellant was overwhelming. The gang experts explained the meaning of appellant's actions and the motive for the killing. In addition, appellant's own recorded statements suggesting silencing or killing Midkiff and wanting to target Detective Skaggs were far more damaging than Davis's "implication." Appellant's alibi of being out-of-state at the time of the killing was rebutted by the motel receipt and the cell phone records.

Thus, the error, if any, in admitting Davis's out-of-court statements was harmless beyond a reasonable doubt

II. Prosecutorial Misconduct

Appellant contends the prosecutor committed misconduct by commenting on the constitutional right to severance, i.e., by eliciting that appellant wished to have his trial severed from that of Davis and commenting on the fact in argument. Appellant reasons those comments should be treated in the same manner as other comments on a defendant's exercise of a constitution right such as the right not to testify, the right to silence, the right to counsel. Other than noting this argument is based on the same facts

as the previous argument, respondent does not respond to the argument regarding treating the comments the same as other comments about a defendant's exercise of a constitutional right.

Appellant also did not raise this objection below, but argues the failure to do so was ineffective assistance. Appellant suggests the prosecutor implied there was something sinister in his desire to have a separate trial and the jury would conclude the defense was trying to hide something. The fact the trials were separated would dispel any such notion. As explained above, the evidence against appellant was overwhelming. Accordingly, we are satisfied beyond a reasonable doubt that the misconduct, if any, did not affect the jury's verdict. (*People v. Hall* (2000) 82 Cal.App.4th 813, 817.)

II. Unavailable Witness

Appellant contends that he was also denied the right to confront and cross-examine a witness when the court allowed Langley's former testimony to be read because the prosecution failed to meet its burden of showing unavailability and the exercise of due diligence to produce Langley.

A. Background

1. Efforts

Langley testified at the preliminary hearing on July 21, 2008. On March 9, 2010, the court held a hearing to determine whether the prosecution had exercised reasonable diligence in attempting to compel Langley's appearance at trial. Detective Corey Farell testified regarding the efforts to locate Langley.

On December 23, 2009, Farell personally served Langley at his residence on 101st Street with a subpoena ordering his appearance at trial on February 23, 2010. Langley failed to appear in court on that date, and a body attachment was issued for his arrest. Farell had no information Langley would not appear on February 23.

Prior to February 23, Farell and others attempted to contact Langley to confirm his whereabouts. On February 18, a police detective went to Langley's residence, but

Langley was not there. Detectives subsequently determined the residence was vacant. Farell's computer search of various databases, including the Department of Motor Vehicles, yielded no address related to Langley other than the residence on 101st Street. The computer search also revealed Langley was not in custody in county jail or in prison.

On February 19, Farell spoke to Langley's landlord, who stated she had not seen Langley since January 1. At that time, Langley had asked his landlord to continue renting the residence to him, indicating he would be traveling and spending time away from the residence for some time.

Farell electronically "flagged" Langley in the Consolidated Criminal History Reporting System. That action notified other California law enforcement agencies to contact Farell in the event Langley became the subject of an investigation. The reporting system was also set up to automatically notify Farell if Langley was in custody. Farell received no such notification.

The Social Security Administration transferred monthly government assistance monies to Langley's bank account. Farell obtained the routing number used to transfer the funds and discovered account activity in February at three locations (a gas station, a 99 Cent Store and a dry cleaning business) in the Bakersfield area. Farell not only enlisted the assistance of Detective Finley in Bakersfield, but also personally went to those locations with a photograph of Langley to determine whether he was a regular customer and if he would return to those locations. No one recognized Langley at the gas station or the 99 Cent Store. At the dry cleaning business, the owner recalled that Langley had been there on March 1 and possibly mentioned having recently moving into the area. Farell and his partner conducted an extensive search of the areas surrounding the three locations, specifically looking for residences with wheelchair ramps or wheelchair accessibility given Langley's confinement to a wheelchair.

Because Langley was a Blood gang member, Farell asked Finley to check if any gang officers assigned to the Bakersfield area had knowledge of, or contact with,

Langley. The gang unit in Bakersfield also checked known Blood hangouts for Langley. This avenue of the search had negative results.

Through the Medicare Administration, Farell learned that Langley had a secondary address on West 77th Street on file with that organization. In the latter part of February, it was determined that Langley's mother had resided at that address, but she had relocated to Dallas, Texas. Farell enlisted the help of the Dallas Police Department; the Dallas police determined Langley's mother lived in a second floor apartment with no wheelchair accessibility. A maintenance worker at the apartment building told Dallas police that he had not seen anyone using a wheelchair at the apartment. The post office had no forwarding address for Langley.

On March 8, Farell spoke with Finley, who had no new information regarding Langley's whereabouts in Bakersfield. A computer search to determine if Langley had new arrests in Kern County or anywhere in the United Stated and inquiries to the coroner's offices in Los Angeles and Kern Counties yielded negative results. A check of the automated field interview system and for traffic tickets revealed no useful information. Farell's check of hospitals and inquiries of government agencies which gave Langley medical services met with negative results.

2. Court Ruling

After citing relevant factors, the court found "the People made more than a reasonable effort to procure" Langley and summarized police efforts to attempt to locate Langley. The court was "particularly impressed" with the fact that on February 18, "the police went again to his residence to insure he might be in line or what the status was." The court concluded Langley "purposefully absent[ed] himself from coming to court."

B. Due Diligence

"[T]o establish unavailability, the prosecution must show that its efforts to locate and produce a witness for trial were reasonable under the circumstances presented. We review the trial court's resolution of disputed factual issues under the deferential substantial evidence standard, and independently review whether the facts demonstrate

prosecutorial good faith and due diligence." (Citations omitted.) (*People v. Herrera* (2010) 49 Cal.4th 613, 623.)

In an earlier case, the Supreme Court discussed the meaning of "due diligence." "'What constitutes due diligence to secure the presence of a witness depends upon the facts of the individual case. The term is incapable of a mechanical definition. It has been said that the word "diligence" connotes persevering application, untiring efforts in good earnest, efforts of a substantial character. The totality of efforts of the proponent to achieve presence of the witness must be considered by the court. Prior decisions have taken into consideration not only the character of the proponent's affirmative efforts but such matters as whether he reasonably believed prior to trial that the witness would appear willingly and therefore did not subpoena him when he was available, whether the search was timely begun, and whether the witness would have been produced if reasonable diligence had been exercised.'" (Citations omitted.) (*People v. Sanders* (1995) 11 Cal.4th 475, 523.)

Appellant contends the police did not exercise due diligence to procure Langley's presence at trial because they started too late, did not take measures to ensure he would appear, and did not competently explore possible leads. Appellant asserts Langley was a crucial witness as he connected appellant to the murder weapon and his credibility was suspect as he was a member of a rival gang and his testimony was inconsistent. Appellant posits that even though the police made significant efforts, they ignored the simple expedients of checking leads in Bakersfield, e.g., interviewing people in the area where Langley had been seen and asking the dry cleaner to notify them if Langley returned, checking hospitals, and asking Langley's mother about his whereabouts. Thus, appellant asserts the police did not make the necessary untiring efforts to procure Langley's presence.

Appellant also argues the police should have taken precautions to prevent Langley's disappearance because Langley repeatedly told the prosecutor at the preliminary hearing that he would not come to court. However, the prosecution is not

required to keep periodic tabs on every material witness in a criminal case, and, absent knowledge of a substantial risk an important witness will flee, is not required to take adequate preventative measures to stop the witness from disappearing. (*People v. Wilson* (2005) 36 Cal.4th 309, 342.) Farell testified he had no knowledge Langley would not appear. As support for this argument, appellant cites to page 25 of the preliminary hearing transcript. In response to the prosecutor question, Langley admitted he told the prosecutor when the prosecutor was at Langley's residence the prior Friday that he was not coming to court and that the prosecutor discussed the possible consequence of his not coming to court. Obviously, Langley was in court so there was no evidence of a substantial risk Langley would not appear in court. In addition, Farell personally served Langley two months before the trial date and detectives checked up on Langley a week before trial. Thus, the prosecution did not start its efforts too late and did not need to take measures to ensure Langley would appear.

We find appellant's argument about possible further efforts unconvincing. Looking for wheelchair accessible residences is as likely to produce a lead as interviewing people in surrounding areas; even if Langley returned to the dry cleaners, the owner might not be the one who would assist him. Farell responded yes when asked if he had checked hospitals. Farell also checked other sources which aided Langley. The contact with Langley's mother was through the Dallas police. As the court concluded, Langley absented himself from court. Thus, even if Farell had made the other suggested checks, it is unlikely he would have found Langley.

From our review of the record, we conclude Farell made reasonable, good faith and untiring efforts to procure Langley's presence. (See *People v. Wilson*, *supra*, 36 Cal.4th at p. 342 ["'That additional efforts might have been made or other lines of inquiry pursued does not affect this conclusion. It is enough that the People used reasonable efforts to locate the witness.' Thus, the trial court did not err in determining that Loar [the witness] was 'unavailable as a witness.'" (Citation omitted.)].)

IV. CALJIC No. 3.00

Appellant contends the jury was erroneously instructed with CALJIC No. 3.00 that an aider and abettor was "equally guilty" as the direct perpetrator when the court should have instructed that he could be found guilty of a lesser offense as an aider and abettor. Appellant also profers that instruction along with the prosecutor's argument that if Davis had an intent to kill, then appellant, as an aider and abettor, also had an intent to kill lowered the prosecution's burden of proof.

A. Background

1. Instructions as given

CALJIC No. 3.00, which defined "principals":

> Persons who are involved in committing a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation is equally guilty. Principals include:
>
> 1. Those who directly and actively commit the act constituting the crime, or
>
> 2. Those who aid and abet the commission of the crime. (Emphasis added.)

CALJIIC NO. 3.01, which defined "aiding and abetting":

> A person aids and abets the commission of a crime when he or she:
>
> (1) With knowledge of the unlawful purpose of the perpetrator, and
>
> (2) With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and
>
> (3) By act or advice, aids, promotes, encourages or instigates the commission of the crime.
>
> A person who aids and abets the commission of a crime need not be present at the scene of the crime.
>
> Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting.
>
> Mere knowledge that a crime is being committed and in the absence of a legal duty to take every step reasonably possible to prevent the crime, the failure to prevent it does not amount to aiding and abetting.

The pertinent part of CALJIC No. 8.80.1 on the gang special circumstance murder allegation:

> If you find that a defendant was not the actual killer of a human being, or if you are unable to decide whether the defendant was the actual killer or an aider and abettor, you cannot find the special circumstance to be true unless you are satisfied beyond a reasonable doubt that such defendant with the intent to kill aided, abetted, counseled, commanded, induced, solicited or assisted any actor in the commission of the murder in the first degree. (Emphasis added.)

2. Prosecutor's Argument

Appellant argues the following statements in the prosecutor's argument invited the jury to convict him based solely on Davis's mental state:

The prosecutor argued that Davis had shot the gun which killed Tennelle and that appellant was "equally guilty" as an aider and abettor. In discussing the concepts of murder, the prosecutor told the jury that "If the actual killer engaged in an intent to kill murder . . . then the aider and abettor is guilty of the intent of the actual killing. If the aider and abettor had the intent to kill but the shooter did not, you take the intent of the aider and abettor." The prosecutor then stated, "your decision as to the degree of murder is based upon what the combination of what the defendant wanted to happen, knew what was going to happen and insist[ed] [on] it happening or what Mr. Davis was thinking." The prosecutor said the jury could find first degree murder if there was an intent to kill on the part of appellant or Davis, saying "either the defendant did or defendant Davis did [have] the intent to kill."

B. Instructional Error

Appellant contends the court should have instructed the jury it could find him guilty of a lesser offense, but instead told the jury to impute the intent of the actual killer to him. Appellant argues that without an instruction appellant could be convicted of a lesser offense, under the given instructions, the jury could only convict appellant of the identical crime as the actual killer.

In *People v. McCoy* (2001) 25 Cal.4th 1111, 1122, the court concluded: "[W]hen a person, with the mental state necessary for an aider and abettor, helps or induces another

to kill, that person's guilt is determined by the combined acts of all the participants as well as that person's own mens rea. If that person's mens rea is more culpable than another's, that person's guilt may be greater even if the other might be deemed the actual perpetrator." The court also noted: "Absent some circumstance negating malice one cannot knowingly and intentionally help another commit an unlawful killing without acting with malice." (*Id*. at p. 1123.)

Subsequently in *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1164, the court there reasoned: "Though *McCoy* concluded that an aider and abettor could be guilty of a greater offense than the direct perpetrator, its reasoning leads inexorably to the further conclusion that an aider and abettor's guilt may also be less than the perpetrator's, if the aider and abettor has a less culpable mental state."

The instruction at issue in *Samaniego* was CALCRIM No. 400, which provided that: "'a person is equally guilty of the crime [of which the perpetrator is guilty] whether he or she committed it personally or aided and abetted the perpetrator who committed it.'" (Italics deleted.) (*People v. Samaniego*, *supra*, 172 Cal.App.4th at p. 1165.) The court determined that CALCRIM No. 400 "while generally correct in all but the most exceptional circumstances, is misleading here and should have been modified." (*Ibid*.)

Although the court went on to discuss the propriety of giving the subject instruction, it determined the defendant had forfeited the issue, noting: "Generally, '"[a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language."'" (*People v. Samaniego*, *supra*, 172 Cal.App.4th at p. 1163.)

In *Samaniego*, in concluding the error was harmless beyond a reasonable doubt, (i.e., the verdict would not have been different) because the jury necessarily resolved the issue of the aider and abettor's state of mind under properly given instructions, the court noted: "It would be virtually impossible for a person to know of another's intent to murder and decide to aid in accomplishing the crime without at least a brief period of

deliberation and premeditation, which is all that is required." (*People v. Samaniego*, *supra*, 172 Cal.App.4th at pp. 1165-1166.)

In *People v. Nero* (2010) 181 Cal.App.4th 504, a case appellant urges this court to follow, the appellate court found the trial court prejudicially misinstructed the jury by giving CALJIC No. 3.00 as it was confusing and should have been modified because the jury had asked if they could find a defendant, as an aider and abettor, guilty of a greater or lesser offense than the perpetrator, which the court opined essentially renewed a prior objection. (*Id*. at pp. 517, fn. 13, 513-520.) Although no such jury confusion was apparent in the case at bar and appellant did not request the court to include any language about convicting an aider and abettor of a lesser offense than the actual killer, appellant asserts his counsel was ineffective for failing to do so. Thus, we address the merits of appellant's claim the jury was misled by the instruction and the prosecutor's argument.

"'[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.'" (*People v. Harrison* (2005) 35 Cal.4th 208, 252.)

CALJIC No. 3.01 explained that an aider and abettor had to know the unlawful purpose of the perpetrator, intend to encourage or facilitate the commission of the crime and by act or advice, aid or encourage the commission of the crime. Along with the need to prove malice aforethought pursuant to CALJIC Nos. 8.10 and 8.11 and the definition of first degree murder in CALJIC No. 8.20, the instructions essentially informed the jury that it had to find appellant knew Davis intended to commit first degree murder, intended to aid and abet that crime and did so. In essence, the gang special circumstance murder instruction informed the jury that in order to find appellant guilty of murder as an aider and abettor, it could not find him guilty unless it was satisfied beyond a reasonable doubt that he acted with the intent to kill. (See *People v. Lopez* (2011) 198 Cal.App.4th 1106, 1120 [even if the court accepted the defendant's premise that CALCRIM No. 400's "equally guilty" language impaired the intent element, the error was harmless because the point was covered elsewhere by the other instructions which defined and detailed the

circumstances under which an aider could be found liable for the same crimes as the codefendant perpetrator].) Therefore, it was not reasonably likely the jury convicted appellant based on Davis's intent to kill. (See *People v. Prettyman* (1996) 14 Cal.4th 248, 272.)

Thus, any error in giving CALJIC No. 3.00 was harmless beyond a reasonable doubt as it was cured by other properly given instructions pertaining to determining appellant's state of mind.

In addition, even though some of the prosecutor's argument improperly suggested appellant could be convicted based on Davis's intent to kill, the jury was instructed to view the instructions as a whole and that attorney statements were not evidence. "Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions." (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Appellant has not rebutted that presumption. (See *People v. Alfaro* (2007) 41 Cal.4th 1277, 1326.)

V. Substantial Evidence

Appellant contends there was insufficient evidence of an intent to kill on his part as an aider and abettor requiring reversal of the gang murder special circumstance and reduction to second degree murder. Appellant notes he was not present at the shooting and, therefore could not have encouraged Davis, and was not aware Davis was armed. Appellant argues there needed to be evidence independent of the experts as an expert cannot testify about intent. The experts did not testify about intent.

"On appeal, '"we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence -- that is, evidence that is reasonable, credible, and of solid value -- from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt."' In conducting such a review, we '"presume[ ] in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."' 'Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive

province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence.' These same principles apply to review of the sufficiency of the evidence to support a special circumstance finding." (Citations omitted.) (*People v. Lee* (2011) 51 Cal.4th 620, 632.)

As noted by appellant, generally an intent to kill "must be inferred from the circumstances of the shooting." (*People v. Ramos* (2004) 121 Cal.App.4th 1194, 1207-1208.)

Midkiff testified about appellant's role as the architect of the evening; he directed her to pick up Davis and another man, directed her to rival territory and where to park. If Midkiff was aware Davis was armed and acting hyper before and after shooting, it is reasonable to infer appellant was also aware of those facts. Appellant's reaction to hearing the shots was not to be surprised or startled as Midkiff was, but to take over driving. Appellant drove away from the scene as soon as Davis and the other man returned to the car and told Davis he had done "good." Langley told the detective he had gotten the murder weapon from appellant.

This case was a typical gang case. The experts testified not only about the rivalry between the Blocc Crips and Eight Trey gangs, but also if a gang member drove deep into a rival's territory, they would not expect it to be for a mere fistfight. Leon explained the meaning of "putting in work" as committing any sort of crime that will benefit the gang. Leon noted it was common for gang members to work together to put in work, for older gang members to utilize younger gang members (appellant was older than Davis), and for younger gang members to put in work to impress or bolster there own reputation with the gang. Killing someone you think is a rival is the "quintessential gang act." Violence, fear and respect are important in gang culture and provide the gang with power in the community.

The circumstances of the shooting, especially the gang context, provide substantial evidence supporting an inference appellant had an intent to aid and abet a murder.

VI. Abstract of Judgment

At oral pronouncement of sentence, the court awarded appellant 932 days of credit for actual time served. The August 31, 2010, minute order and the abstract of judgment incorrectly reflect an award of 922 days of credit; the court did not award any good time/work time credit. The oral pronouncement prevails. (*People v. Price* (2004) 120 Cal.App.4th 224, 242.) Respondent concedes the abstract and minute order should be corrected. The minute order and abstract of judgment are so corrected.

DISPOSITION

The judgment is affirmed. The August 31, 2010, minute order and the abstract of judgment are corrected to reflect an award of 932 days credit for actual time served. The superior court is ordered to prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment reflecting that change.

WOODS, Acting P. J.

We concur:

ZELON, J. **JACKSON, J.**